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No. 98-1417

IN THE

Supreme Court of the United States

GRAND CANYON TRUST, *et al.*,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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Respondents' opposition briefs are notable for what they do *not* dispute. Respondents do not dispute that the 1987 Grand Canyon Overflights Act, in the words of the Court of Appeals, required "expeditious agency action." Pet. App. 36a. Respondents do not dispute that the Federal Aviation Administration ("FAA") has failed, nearly twelve years later, to promulgate regulations it believes will accomplish the mandate of the Overflights Act—the "substantial restoration of the natural quiet" to Grand Canyon National Park. Respondents do not dispute that Congress' mandate will not be achieved prior to 2008, twenty-one years after the Act's passage. Finally, respondents do not dispute that the predicted achievement of the statutory mandate rests only on long-promised but still undefined regulations to be promulgated by the FAA at some indeterminate time in the future.

Respondents nonetheless insist that the Court of Appeals acted in accordance with its obligation under the Administrative Procedure Act to "compel agency action * * * unreasonably delayed," 5 U.S.C. § 706(1), when it took the government "at its word," Pet. App. 39a, more than a decade after the fact, that it would eventually issue the required regulations that would restore natural quiet and that it would accomplish this goal more than twenty years after Congress' mandate issued. Respondents also insist that the question whether the lower courts are requiring agencies to follow congressional mandates on a timely basis is of little consequence. As set forth in the petition, and as further explained below, respondents are wrong. The Court of Appeals' interpretation of its obligations under Section 706(1) was indefensible, and the effects of its decision widespread. This Court's review is therefore necessary to clarify the circumstances in which Section 706(1) should be invoked to compel agency action that has been unreasonably delayed.

1. The central point of the FAA's opposition is its contention that the Court of Appeals acted properly because once an agency has taken *some* minimal action to comply with a congressional mandate, no matter how inadequate that action may be, a court can never find unreasonable delay under the APA. *See* FAA Opp. 16 ("taking administrative action is one thing, completely remedying the problem at which a statute is directed quite another"); *id.* (arguing that Section 706(1) does not apply here because the section "does not speak to the content of a rule once it is issued"). We agree that the Court of Appeals adopted this view, but that fact only underscores the need for this Court's review.

The FAA begins its opposition with a piecemeal recitation of the few steps it *has* taken over the years in response to the mandate of the Overflights Act. The opposition painstakingly recounts the promulgation of SFAR-50-2, a rule that all acknowledge was inadequate to satisfy the congressional mandate; the creation of the Park Service report, issued years after SFAR-50-2, confirming that the rule was not an adequate response to the Overflights Act; and the publication

of the Final Rule on December 31, 1996, just shy of ten years after the Overflights Act was passed. *See* FAA Opp. 3-7.

This long recitation of events only confirms the unreasonableness of both the agency's delay and the Court of Appeals' approval of it. As the FAA acknowledges, none of the actions it has taken have come close to achieving the statutory mandate Congress imposed in the Overflights Act: substantial restoration of natural quiet to Grand Canyon National Park. Indeed, the agency concedes that the 1996 Final Rule represents only "progress toward" the statutory mandate, FAA Opp. 6, and it argues only that undefined regulations to be created at some point in the future would make up the shortfall. Notably, the agency makes no suggestion that it has made any forward progress on promulgating a rule designed to achieve substantial restoration of natural quiet even by 2008, the self-imposed "deadline" accepted by the Court of Appeals. To the contrary, the FAA itself notes that it has withdrawn an earlier proposal designed to reach that goal, and has made no progress whatsoever in developing other regulations. *Id.*

As noted, however, the FAA argues that because it has taken *some* action to implement Congress's mandate, it is relieved from its obligation to actually fulfill that mandate within a reasonable time. *See* FAA Opp. 16; *supra* at 2. But as we pointed out in our petition, the APA requires an agency to "*conclude* a matter presented to it" within a "reasonable time," 5 U.S.C. § 555(b) (emphasis added), not just to make the occasional stab at achieving its mandate. Under the FAA's view, if it had issued a rule prohibiting visitors from yelling in the Grand Canyon, it would have taken sufficient "action" toward meeting the Congressional mandate to insulate it from a Section 706 petition. After all, while the prohibition would not have "completely remed[ied] the problem" at which the Overflights Act was directed, FAA Opp. 16, such a rule would have gone part of the way toward meeting the statutory goal. That view—which we agree was accepted by the Court of Appeals—is simply wrong and underscores the danger in allowing the Court of Appeals'

decision to stand unreviewed. An agency "cannot avoid application of the APA simply by refusing to act," *Southwest Williamson County Community Ass'n, Inc.* v. *Slater*, No. 97-6526, 1999 WL 247104 at *4 (6th Cir. Apr. 28, 1999), and it likewise cannot avoid application of the APA by interminably delaying actual compliance with a statutory mandate. *See Public Citizen Health Research Group* v. *Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987) (court of appeals "cannot countenance maneuvering that merely maintains a facade of good faith compliance with the law").

The FAA also puts great emphasis on its contention that Congress "set deadlines for the promulgation of an initial plan,"[1] but did not set a "deadline for achieving the goal itself." FAA Opp. 10; *see also* id. at 11 (arguing that the Overflights Act did not require agency to issue a revised rule "by any fixed date"). Even if this were true—and it is not, *see* Pet. 5—the Government's distinction is irrelevant. The lack of a concrete statutory deadline means only that the agency's actions (or lack thereof) are reviewed under the "unreasonable delay" prong of Section 706, not under its "unlawfully withheld" prong. *See Forest Guardians* v. *Babbitt*, 164 F.3d 1261, 1272 (10th Cir. 1998) ("the distinction between agency action 'unlawfully withheld' and 'unreasonably delayed' turns on whether Congress imposed a date-certain deadline on agency action"), *mod. on other grounds*, 1999 WL 236274 (10th Cir. Apr. 22, 1999). And in any event, the Government has conceded (as it must) that Congress intended "expeditious" agency action in response to the Overflights Act, Pet. App. 36a, even absent a fixed statutory deadline for compliance.

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[1] The statute requires a "*final* plan," not an "initial plan," as the Government disingenuously represents. *See* National Parks Overflights Act § 3(a), 16 U.S.C. § 1a-1 note (ordering FAA Administrator, not later than 90 days after receiving recommendations from the Secretary of the Interior, to "prepare and issue a *final plan* for the management of air traffic in the air space above the Grand Canyon") (emphasis added).

In short, the view shared by both the FAA and the Court of Appeals—that an agency is immunized from the requirements of Section 706(1) so long as it issues *some* regulation, no matter how defective—virtually nullifies the statute and should not be allowed to stand unreviewed.

2. As we demonstrated in the petition, this Court's review is also warranted because of the extraordinary nature of the delay approved by the Court of Appeals, and because of the dangerous signal that approval sends to the FAA and other agencies continually subject to that court's review. The FAA, however, maintains that prior decisions finding agency delays of far fewer than twenty-one years to be unreasonable are not helpful guidance here, because of "the circumstances of the rulemaking at issue." FAA Opp. 15. Respondent Clark County similarly contends that because any examination of unreasonable delay is necessarily a case-by-case determination, earlier decisions do not inform the question in this case. *See* Clark County Opp. 3.

While each case of unreasonable agency delay must, of course, be evaluated on its own merits, prior decisions on the issue must still inform that inquiry. Before this case, the collective body of decisions from the courts of appeal addressing unreasonable agency delay adhered to some basic parameters—among them that delay of one or two years, "but *not* several years or a decade," would be tolerated. *MCI Telecomms. Corp.* v. *FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980) (emphasis added). Yet even today, more than twelve years after enactment of the Overflights Act, the FAA has *still* not issued regulations that it believes will accomplish Congress' objective, and the agency has no plans to restore the Park's natural quiet until yet another decade has passed. As we pointed out in the petition, no court of appeals has ever condoned agency delay remotely approaching the length of the delay here. *See Public Citizen* v. *Brock*, 823 F.2d at 629 (six-year delay in promulgating environmental regulation "treads at the very lip of the abyss of unreasonable delay"). Respondents simply have no answer to that argument.

Respondents also defend the agency's delay in this case, as did the Court of Appeals, by making vague statements about the "complexity of the regulatory issues" involved. FAA Opp. 13; Clark County Opp. 13. But as we have shown, while courts have made allowances for the "complexity" of agency proceedings before, they have *never* made two full decades' worth of allowance. *Compare Public Citizen* v. *Brock*, 823 F.2d at 629 ("complexity" of the questions involved and agency's limited resources warranted eight-month delay); *In re United Steelworkers of Am.*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (14-month delay in completing final rule not "facially unreasonable," where agency was addressing "complex scientific and technical issues"). Nor do respondents answer our contention that Congress knew full well the issue here might be "complex," yet chose an expeditious timetable for addressing that issue.

3. Perhaps recognizing the weakness of its defense on the merits, the FAA attempts to blame petitioners for its own delay. The FAA argues throughout its opposition that because petitioners failed to come forward and complain prior to filing their petition for review, they should not be heard to complain now. *See* FAA Opp. 11 ("petitioners never sought to compel" earlier agency action); *id.* at 12 ("petitioners never challenged SFAR 50-2 * * * never sought to compel the NPS to issue its report * * * and never sought to compel the FAA to amend SFAR 50-2"). Clark County likewise argues that petitioners "took until 1997 * * * to complain about alleged delay," and that their failure to seek review earlier "suggests that the harm from any such delay was not particularly great." Clark County Opp. 11. Both respondents took their cue from the Court of Appeals itself, which suggested in passing that while the agency had been "undeniably slow" in proposing the Final Rule, "this [was] the first time any party has challenged the agency's delay in court." Pet. App. 37a.

Respondents' argument is particularly ill-considered, and the Court of Appeals' acceptance of it, if allowed to stand unreviewed, would set a dangerous precedent for future

cases. First of all, it took nearly a decade for the FAA to promulgate a final rule allowing petitioners to seek judicial review; had they attempted to complain earlier, the FAA surely would have moved to dismiss their challenge as being premature. But even more importantly, a holding that petitioners cannot receive redress now because they should have litigated the agency's unreasonable delay earlier creates incentives no court would welcome: parties will no longer be patient with agency delay, but will file petitions for review or for mandamus early and often, to stave off any charges of delay on their part. It is illogical (to say the least) to argue that a petition for review grounded on a statute prohibiting *unreasonable delay* may be denied if a party has waited too long to file the petition. As with its other determinations, the Court of Appeals' acceptance of this theory only demonstrates the need for this Court's review.

4. The FAA responds only in a footnote to our second major point: that this Court's review is required because the Court of Appeals abdicated its duty under the APA when it took the FAA at its "word" that the agency would eventually accomplish the task Congress charged it with in 1987, thereby allowing the agency to dictate the limits of its judicial review. The agency claims that the Court of Appeals' decision was "fully consistent with precedent." FAA Opp. 18 n.4. But the three cases it cites each involved a showing that *concrete* agency action would be taken within a strictly delimited timetable. *See Action on Smoking and Health* v. *Department of Labor*, 100 F.3d 991, 994 (D.C. Cir. 1996) (regulatory action would be accomplished in " 'fiscal year 1997' ") (citation omitted); *United Steelworkers*, 783 F.2d at 1120 (approving 14-month timetable for promulgating rule); *Oil, Chem. & Atomic Workers Int'l Union* v. *Zegeer*, 768 F.2d 1480, 1488 (D.C. Cir. 1985) (approving two-year timetable to issue rulemaking). In contrast, when confronted here with a government attorney's unsupported representation that the agency, after failing for more than a *decade* to issue required regulations, would at some unspecified date issue a rule designed to accomplish the statutory goal in another *eleven years*, the Court of Appeals

simply took the government at its "word" and refused to retain jurisdiction over the case. That action was an egregious departure from prior decisions that warrants this Court's review.

5. In the petition, we showed that this case is of national importance because the FAA has failed to take required action to remedy what Congress determined more than a decade ago was a threat to the environment of what is perhaps the Nation's most treasured natural wonder. The FAA's response only demonstrates its persistent disregard of the priorities that Congress has set for it. The FAA suggests throughout its opposition that this Court should refrain from granting certiorari because, while it has not achieved Congress's 1987 mandate, the situation in the Grand Canyon is nevertheless tolerable. *See* FAA Opp. 13, 19 n.5. It maintains that the regulations currently in place set a "curfew" allowing air tours only during the day, and that only a small percentage of visitors actually report being annoyed by aircraft noise during their visit to the Canyon. *See id.* at 5, 13, 19 n.5. These meager excuses only underscore why the Court of Appeals should not have abdicated its responsibilities under the APA. It should be obvious that night air tours over the Grand Canyon would not be well-attended and that restricting tours to daylight hours is no restriction at all. And whether the level of noise at the Canyon is tolerable is not the agency's decision to make. The decision was *Congress*'—in fact, it was the FAA's refusal to act on its own that prompted the Overflights Act in the first place, *see* Pet. 4 n.5—and Congress told the FAA in no uncertain terms to promptly remedy the problem of aircraft noise in the Park. The agency has not done so more than twelve years later and the Court of Appeals' decision to look the other way plainly warrants this Court's intervention.

5. Finally, the FAA argues that this Court should refrain from granting certiorari in this case because "the issue presented arises under unique statutory provisions," FAA Opp. 9, and does not present " 'an important question of federal law that has not been, but should be, settled by this

Court.' " *Id.* 19 (quoting S. Ct. Rule 10(c)).[2] That is wrong. The issue presented in this petition—as evidenced by the question presented—is whether the Court of Appeals failed to fulfill its obligation under the Administrative Procedure Act to "compel agency action * * * unreasonably delayed." The APA is not an obscure provision. To the contrary, it applies to all agencies of the Federal government and the decisions of the D.C. Circuit construing the APA greatly influence both the actions of those agencies and the views of other circuit courts. This Court has never before considered the extent of the obligations of the lower courts under Section 706(1). It should take the opportunity now, grant the petition, and confirm that Section 706(1) is not merely aspirational, but requires courts to step in when agency action—as here—has been far too long delayed.

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[2] The FAA also argues that the Court of Appeals' decision "does not conflict with the decision of any other court of appeals or with any decision of this Court." FAA Opp. 9. As petitioners have observed, the District of Columbia Circuit is the court most likely to address whether an agency has unreasonably delayed action, as evidenced by the host of its prior decisions on the issue. *See* Pet. 19; *id.* at 13-16. As we also noted, the decision of the Court of Appeals in this case sharply conflicts with prior cases from that circuit. *Id.* at 15-16; *see also supra* at 5. And because the Court of Appeals' decision to "take the government at its word," Pet. App. 39a, improperly relieved the court of its statutory obligation to "compel agency action * * * unreasonably delayed," the decision also conflicts with the Tenth Circuit's opinion in *Forest Guardians*, 164 F.3d at 1268-69. *Forest Guardians* made clear that reviewing courts do not just have the "authority" to compel an agency to act, Pet. App. 35a, but *must* compel the agency to act when it has unreasonably delayed fulfilling its congressional mandate.

CONCLUSION

For the foregoing reasons, and for those set forth in the petition, the petition should be granted.

Respectfully submitted,

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